

UNITED STATES COAST GUARD

VS.

suspended Appellant's Merchant Mariner's Document outright for two months with an additional suspension of three months remitted on nine months probation upon finding proved the charge of misconduct. The single specification supporting the charge alleged that, on or about 12 August 1990, Appellant, while serving under the authority of his document as tankerman, did wrongfully fail to follow vessel oil transfer procedures and did wrongfully violate 33 C.F.R. 156.120(t)(3), to

wit: violating instructions for topping-off cargo tanks on the barge SFI-33.

The hearing was held at Houston, Texas on 16 January 1991. The Investigating Officer introduced nine exhibits into evidence and introduced the testimony of three witnesses. Appellant was represented by professional counsel and introduced four exhibits and the testimony of one witness. Appellant entered a response of "deny" to the charge and specification as provided in 46 C.F.R. 5.527.

The Administrative Law Judge's written order suspending Appellant's Merchant Mariner's Document was entered on 8 April 1991. The decision and order were served on Appellant on 10 April 1991. Appellant filed a notice of appeal on 3 May 1991. Upon request, a transcript of the proceeding was served on Appellant, however, there is no definitive record of when the transcript was served on Appellant. Appellant submitted a brief on 7 June 1991. Accordingly, this matter is properly before the Vice Commandant for review.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of and serving under the authority of Merchant Mariner's Document Number 433-13-1574, issued to him by the United States Coast Guard.

On 12 August 1990, Appellant was serving under the authority of the above-captioned document as tankerman loading oil product aboard the tank barge SFI-33, while dockside at the Lyondell Petrochemical Company on or near the Houston Ship Channel. The transfer operation involved the concurrent loading of another

barge (SFI-61) which was moored alongside the SFI-33. The actual transfer of product to both barges began about 0210 on 12 August 1990 at a rate of approximately 2,000-3,000 (1,000-1,500 per barge) barrels per hour, which was increased to approximately 5,000 (2,500 per barge) barrels per hour at approximately 0730. At approximately 0955, while still loading product, the SFI-33 collapsed or buckled amidships, port to starboard, resulting in a discharge of 21,000 gallons of oil into the water.

Appearance: Mark C. Dodart, Esq., Phelps Dunbar, 30th Floor, Texaco Center, 400 Poydras St., New Orleans, LA 70130-3245.

BASES OF APPEAL

Appellant asserts the following three bases of appeal from the decision of the Administrative Law Judge:

1. There was no reliable evidence in the record to support the Administrative Law Judge's conclusion that Appellant was "topping-off" any of the barge tanks at the time of the incident;
2. The Administrative Law Judge's finding of fact No. 10, which is critical to the logic of his decision, is not supported in the record and is contrary to the evidence in the record;
3. The Administrative Law Judge erroneously misconstrued the evidence and testimony and interchangeably used the terms "loading" and "topping-off" to reach his conclusion.

OPINION

I

Appellant asserts that there was no reliable evidence in the record to support the conclusion that Appellant was "topping- off" at the time of the incident. I do not agree.

Conflicting evidence exists in the record on the issue of whether in fact Appellant was topping-off the SFI-33 at the time of the incident. The Administrative Law Judge found the testimony of all of the witnesses credible [Decision and Order, Finding of Fact No. 5, at 10]. Moreover, the Administrative Law Judge is vested with broad discretion in weighing credible but conflicting evidence and making determinations and findings based upon that evidence. Appeal Decisions 2524 (TAYLOR); 2503 (MOULDS); 2156 (EDWARDS); 2472 (GARDNER); 2116 (BAGGETT).

A review of that conflicting evidence follows.

A fellow documented tankerman, Harry Ellis, Jr. testified that topping-off does not occur until the last 30-40 minutes of the transfer. [TR 52]. Ellis had been a qualified tankerman for two years. Ellis was at the scene of the barge collapse as tankerman of the SFI-61, which was simultaneously being loaded adjacent to the SFI-33. He further testified that, in his opinion, Appellant was not topping-off the SFI-33 at the time of the incident and that topping-off would not have occurred for another three or four hours. [TR 53].

The supervisor of the company tankermen, Philip Johnson, with approximately fifteen years industry experience, concurred that

topping-off does not occur until approximately the last 30-40 minutes of transfer. [TR 188]. Mr. Johnson conducted an investigation into the collapse of the SFI-33, appearing on scene approximately two hours after the barge collapse. Additionally, he testified that Appellant had a little less than three hours remaining before he would be ready to top-off the cargo tanks of the SFI-33. [TR 206].

The air sampler on duty on the SFI-33, Paul Mostyn, testified that approximately 10-15 minutes before the incident, Appellant was not topping-off the tanks and "still had a ways to go." [TR 168]. However, Appellant's own admission, made to Mostyn before the barge collapse, at a time when Appellant had no reason to be confused or upset, is that he was "topping-off the middle tanks." [TR 170]. This admission, under these circumstances, is most telling and corroborates Appellant's later statement to Adcock, following the barge collapse. See, infra.

Conflicting in part with the above-cited testimony is the testimony of Steven Adcock, a cargo surveyor with three years experience. Mr. Adcock testified that topping-off, in his opinion, means that the tankerman is within one hour of completing the loading of the barge. [TR 138]. Adcock testified that when he arrived to gauge the SFI-33, shortly after its collapse, Appellant told him: "I was topping-off my two center tanks and the barge buckled." [TR 135]. Adcock also testified that after gauging, which was done at approximately 1300, he noted that the two center tanks of the SFI-33 were 80-90 percent full. [TR 135-136]. Additionally, Adcock testified that when

the oil terminal calls him to report to the barge for gauging, it is possible that the tankerman has "an hour to 30 minutes to finishing up completion of loading the barge." [TR 139-140].

Based on this testimony and the exhibits admitted in evidence, the Administrative Law Judge found the charge and specification proved. I will not disturb that finding.

As stated supra, the Administrative Law Judge is given wide latitude in determining the weight attributed to evidence in the record. Only in exceptional cases will such determinations be modified. The fact that the record contains conflicting or inconsistent evidence does not per se vitiate the findings of the Administrative Law Judge based on such evidence. The findings of the Administrative Law Judge need not be completely consistent with all evidence as long as sufficient evidence exists to reasonably justify the findings. Appeal Decisions 2524 (TAYLOR); 2516 (ESTRADA); 2282 (LITTLEFIELD); 2492 (RATH); 2503 (MOULDS).

II

Finding of Fact No. 10 in the Decision and Order of the Administrative Law Judge states in pertinent part:

It was also stipulated by counsel and it was established by the evidence in the entire hearing record that these topping off procedures clearly state that this tank barge SFI-33 should have been finished or "topped off" in the following manner by Respondent Tankerman Serrette: first the number 1 cargo tank should have been "topped off" or filled to the desired level; secondly, the number 2 cargo tank; thirdly, the third cargo tank; and then finally the fourth or aft cargo tank should have been topped off. Instead the Respondent admitted to two witnesses that he was "topping off" or filling

up the number 3 and number 2 first when the barge collapse occurred. Respondent's supervisor, Philip Johnson, testified that he had directed the tankermen supervised by him, including Respondent Serrette and Ellis, to load such barges by topping off these two center tanks first. Mr. Ellis testified that they had been ordered by Mr. Johnson to load the tanks in that fashion by loading and topping off the two center tanks first, namely in this barge, the 2 and 3 cargo tanks.

Appellant asserts that the first sentence is not supported by the record. I disagree.

Both the specific language of the company topping-off instruction and the record reflect that Appellant was required to top-off the barges's cargo tanks commencing with the number 1 tank, moving aft to the number 4 tank. This is based on the fact that the cargo header was located between the number 3 and number 4 cargo tanks aboard the SFI-33. This was stipulated by Appellant in the record. [TR 31-32]. The company instruction in issue specifically requires that cargo tanks be topped-off in a specific manner: "[T]anks the farthest from the loading header will be topped-off first and then nearest the header will be topped-off last." [I.O. EXH. 3].

Furthermore, contrary to Appellant's assertion, I do not believe that this first sentence of the finding of fact was meant to infer that the barge was to be completely sequentially filled commencing with tank number 1. The plain language of the sentence prevails and relates exclusively to topping-off procedures.

Secondly, Appellant urges that the second sentence is not accurate and not supported by the evidence. I disagree. As detailed in Opinion I, supra, Appellant did state to two

witnesses (Adcock and Mostyn) that he was topping-off the center tanks at the time of the incident.

Appellant asserts that sentence 3 of finding of fact No. 10 is inaccurate. Appellant contends that the witness Johnson never testified that he instructed Appellant or the other tankerman (Ellis) to "top-off the center tanks first." Appellant asserts that Johnson in fact testified that he instructed the tankermen to "load more product into the center tanks first, then load the bow and stern tanks, then top-off all the tanks."

It is true that sentence 3 is somewhat inaccurate. However, this inaccuracy is harmless error, having no bearing on the fact that the Administrative Law Judge found that Appellant had topped-off the center tanks in violation of the company instruction. Regardless of whether or not the tankermen's supervisor, Johnson, instructed the tankermen to "load" the tank in any particular manner, the fact remains that Appellant failed to follow the company's specific instructions regarding "topping-off" procedures.

III

Appellant asserts that the Administrative Law Judge erroneously interchanged the critical terms "loading" and "topping-off."

Notwithstanding that the Administrative Law Judge interchanged the aforementioned terms, I find this to be harmless error. The record supports the Administrative Law Judge's finding that Appellant was topping-off the barge immediately

prior to the incident. The record also supports the ultimate finding that Appellant wrongfully failed to follow the barge's oil transfer procedures "for topping-off tanks." [Decision & Order, Finding of Fact 12, at 13]. The use of the term "loading" as a term of art in describing the topping-off procedures did not, in any perceivable manner, prejudice Appellant. Similarly, there is no showing that it deleteriously affected the ability of the Administrative Law Judge to reach a well-reasoned, factually supported finding.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The Decision of the Administrative Law Judge dated 8 April 1991 is AFFIRMED.

//S// MARTIN H. DANIELL
MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 27th day
of November, 1991.